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No. 84-6646

In The

Supreme Court of the United States

October Term, 1984

WILLIE LLOYD TURNER,

Petitioner,

v.

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF ON BEHALF OF RESPONDENT

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QUESTION PRESENTED

Whether Petitioner presented the trial court with sufficient facts establishing special circumstances under *Ristaino* v. *Ross*, 424 U.S. 589 (1976), to require specific inquiry on *voir dire* as to possible racial prejudice by any member of the venire?

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 753 F.2d 342 (1985).

JURISDICTION

The Petitioner asserts that the jurisdiction of this Court is based upon 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

On July 12, 1978, the Petitioner, Willie Lloyd Turner, entered a jewelry store located in Franklin, Virginia, in Southampton County. Using a sawed-off shotgun, Petitioner directed customers and employees to line up against the counter on one side of the store and then forced the proprietor, W. Jack Smith, Jr., to put money from the cash

register into some jewelry bags. (Tr. 119-120).[1] As Smith did so, he activated a silent alarm. A local police officer, A. D. Bain, Jr., then arrived and inquired about the alarm. (Tr. 124). Petitioner surprised Bain and made him surrender his revolver.

At this point Turner fired a pistol shot towards the back of the store, and stated if he saw or heard any additional police officers he was going to start killing those in the store. From a distance of 12 to 15 feet, Petitioner then pointed the gun at Smith and fired without warning or provocation. (Tr. 213). Smith slumped down behind the counter and began bleeding from a head wound. (Tr. 127).

Officer Bain attempted to reason with Turner and promised to carry him out of town if he would not shoot anyone else. Petitioner, however, responded by stating: "I'm going to kill [Smith] for snitching on me." (Tr. 132).

As Smith lay helpless and "gurgling" on the floor behind the counter, Petitioner then shot him two times in the chest in a "rapid fire" manner. (Tr. 133, 214-215). These last two shots, which hit Smith in the chest, caused him to jump. Turner was not "nervous" or "shaking"[2] but rather looked right over the counter as he shot Smith. (December 5, 1979, Tr. 46-48). Smith died of the wounds in his chest, either of which would have been fatal. (Tr. 204-205). Officer Bain was then able to disarm and subdue Turner until other police officers arrived on the scene.

Petitioner was later indicted by the Southampton County grand jury on the charges of capital murder, use of a fire-

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[1] References are to the trial transcript of December 3 and 4, 1979, and will be designated (Tr. ——).

[2] Contrary to Petitioner's assertion (Br. 4) that he "apparently panicked," there is not the slightest indication from any of the eyewitnesses who testified at trial that Petitioner acted in anything other than a deliberate and calculated manner.

arm in the commission of murder, and possession of a sawed-off shotgun in the commission of robbery. Prior to trial, a change of venue was granted at Petitioner's request and the trial was held in Northampton County. Northampton County is non-contiguous to Southampton County and is located on the Eastern Shore of Virginia. Eastville, the place of trial, is approximately 80 miles from Franklin, the location of the murder.

At trial, prior to the commencement of the *voir dire*, Petitioner's counsel raised a number of matters relating to the manner and substance of the *voir dire*. The trial judge ruled that he would question the prospective jurors collectively in groups of five and would then examine them individually as to their views on capital punishment. The trial court further indicated that it would receive questions tendered by each party for possible use during *voir dire*. Petitioner's counsel, in accordance with this ruling, submitted a number of proposed written questions.[3] The trial court declined to ask a proposed question which concerned possible racial prejudice. No reason for propounding this question was advanced. The only reference to race was counsel's separate argument earlier in the proceedings that Virginia's death penalty was being unconstitutionally administered. (J.A. 10-13). In support of this latter proposition, which was made as a matter "of law . . . for the Court to decide," counsel introduced a Northeastern University study dealing with the imposition of the death penalty in five other states. (J.A. 13).

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[3] Both at trial and on direct appeal to the Supreme Court of Virginia, Petitioner attacked for statutory and constitutional reasons the failure of the trial court to permit his attorneys directly to question the prospective jurors as well as its refusal to allow individual *voir dire*. *See Turner* v. *Commonwealth*, 221 Va. 513, 519-22, 273 S.E.2d 36 (1980). In the instant appeal, Petitioner does not attack the correctness of the trial judge's rulings on either of these matters.

While the court did not make any specific inquiry regarding racial prejudice, it did ask a series of questions to determine whether the members of the venire were impartial. The court asked whether they had learned anything regarding the case, whether they had formed any opinion as to Petitioner's guilt or innocence, whether they were related in any way to any person employed as a police officer or other law enforcement official, and whether they or any members of their families had been victims of crime. (J.A. 16; Tr. 44, 51-52, 62, 70-71, 82, 88, 92-93, 96-97). In addition, while in the physical presence of Turner, the jurors were asked questions designed to disclose bias or prejudice including whether they could give Turner a fair and impartial trial. (J.A. 17; Tr. 39-41, 47-48, 55, 65, 85, 94, 98).

The *voir dire* resulted in a jury composed of eight whites and four blacks.[4] The members of the jury elected one of the four black individuals, J. E. Worsley, foreman of the jury. (Tr. 334). During the *voir dire*, a total of 31 jurors were questioned.[5]

From a panel of 20, each party was permitted four peremptory challenges. Additionally, out of a second group of four veniremen, each party was permitted to exercise one further peremptory challenge to select two alternate jurors.[6]

On December 3-4, 1979, Petitioner was tried and con-

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[4] *See* Addendum 1.

[5] Petitioner incorrectly states that 43 jurors were questioned. (Br. 7).

[6] While Petitioner asserts several times in his Brief that the *voir dire* lasted less than two hours, he points to nothing in the record to substantiate this assertion. On the contrary, the transcript states that the *voir dire* began at 11:15 a.m. and continued uninterrupted until 1:50 p.m. (Tr. 40, 102). Thus, the *voir dire* lasted over two and one-half hours.

victed by the jury of all of the offenses charged against him. Thereafter, in the penalty stage of the trial, the Commonwealth introduced evidence setting forth Turner's extensive criminal record.[7] Turner introduced testimony from a psychiatrist that he "was under the influence of mental disturbance while he was committing the crime." Several relatives of Petitioner testified as to his background and character. Thereafter, the jury recommended a sentence of death.

The trial court then ordered a post-sentence report to be prepared. After receiving and considering the report, the court affirmed the jury's recommendation, finding that the sentence was appropriate.

SUMMARY OF ARGUMENT

The Constitution does not grant a criminal defendant an absolute right to compel the trial court to pose specific questions on *voir dire* regarding racial bias simply because the defendant and victim are of different races. *Ristaino* v. *Ross*, 424 U.S. 589 (1976). This is true irrespective of the nature of the offense or the severity of the potential punishment. Only when the issue of race becomes so inextricably linked with the issues that will arise at trial does such an inquiry become constitutionally required. *Ham* v. *South Carolina*, 409 U.S. 524 (1973). Unless the defendant points to particular circumstances akin to those in *Ham*, the trial court discharges its constitutional obligation to assemble an impartial jury by conducting a more gen-

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[7] Prior conviction orders were introduced showing:
September 21, 1970—malicious maiming;
March 22, 1972—escape;
February 12, 1973—unlawful wounding;
September 26, 1973—malicious wounding;
March 21, 1974—second degree murder.

eralized examination concerning the fitness of the prospective jurors.

In this case Petitioner failed to apprise the trial court of any indicium of possible racial bias beyond the mere fact that he was black and the decedent was white. At most, Petitioner pointed to a study dealing with the application of capital punishment in five states other than Virginia. The deficiencies of that particular study have been well documented by the Supreme Court of Virginia and Petitioner himself.

Petitioner has acknowledged that nothing in this case directly suggested racial antagonism, and the *voir dire* established that Petitioner and his crime were unknown in the community where he was tried. To conclude, upon such a paucity of evidence, that Petitioner adequately advised the trial court of any reason necessitating a specific focus on racial bias would effectively contravene this Court's holding in *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981), that there is no constitutional presumption of any particular kind of racial or ethnic bias on the part of jurors. Equally, the ruling sought by Petitioner would undermine this Court's refusal in *Ristaino* to subscribe to the notion that in this country's heterogeneous society race invariably affects the dispensing of justice.

In this case there was nothing to show that Petitioner's race would possibly play any material role in the jury's deliberations. This is especially true in light of the uncontradicted evidence of Petitioner's guilt and the overwhelming evidence at sentencing. That race did not infect the jury's deliberations is borne out by the fact that four jurors, including the foreman, were black. The conduct of *voir dire* is committed to the sound discretion of the trial court, and there is no basis in this case for concluding that this discretion was abused.

Petitioner's references to historical application of capital punishment prior to *Furman* v. *Georgia*, 408 U.S. 238 (1972), cannot be relied upon to establish a special circumstance under *Ham*. This Court's decisions in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), and *Jurek* v. *Texas*, 428 U.S. 262 (1976), demonstrate that constitutionally drafted statutes can be relied upon to eradicate vestiges of prior improper practices. Moreover, *Gregg* and *Jurek* refute any suggestion that the jury could not constitutionally exercise its statutorily-bestowed discretion in sentencing Petitioner unless it was first explicitly examined as to racial bias.

The statistical studies relied upon by Petitioner are seriously flawed and do not purport to measure how capital punishment is being administered in Virginia. There exists no basis upon which this Court can conclude that capital punishment is being discriminatorily applied in Virginia or that the jury selected in this case was racially prejudiced.

Petitioner does not challenge the general applicability of *Ristaino*, and the validity of that decision is not now in dispute. This Court should not announce a new constitutional rule which even Petitioner does not seek. To require a *per se* rule would inevitably lead to similar inquiries on such marginally related matters as the venire's sexual, political and religious views. Such an approach would be unwise, as it would substantially eliminate the trial judge's traditional discretion to conduct *voir dire* and, at the same time, it would unnecessarily permit overly intrusive examination of the jurors' purely personal beliefs.

ARGUMENT

I.

The Trial Court Did Not Abuse Its Discretion By Declining To Ask The Venire A Specific Question Concerning Racial Prejudice.

This Court examined the question of whether the failure of a state trial judge to examine prospective jurors on *voir dire* as to possible racial prejudice violated a defendant's constitutional rights in *Ham* v. *South Carolina,* 409 U.S. 524 (1973). Ham was a young black man well-known in his community for his work in civil rights activities. His basic defense at trial was that law enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the charges.

Prior to *voir dire* examination of prospective jurors, counsel for Ham requested the judge to ask several questions addressed to the possibility of racial prejudice.[8] The trial judge declined to ask these specific questions requested by Ham, but did pose three general questions as to bias, prejudice or partiality specified by state law.

Within this factual framework, this Court concluded:

> [W]e think that the Fourteenth Amendment required the judge *in this case* to interrogate the jurors upon the subject of racial prejudice. South Carolina law permits challenges for cause, and authorizes the trial judge to conduct *voir dire* examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that *under the facts shown*

[8] The questions sought to be asked were: "1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race? 2. You have no prejudice against Negroes? Against black people? You would not be influenced by the use of the term black?"

> *by this record* the petitioner be permitted to have the jurors interrogated on the issue of racial bias.

Ham v. *South Carolina*, 409 U.S. at 527 (emphasis added).

The ruling in *Ham*, however, did not establish a constitutional rule of universal applicability. In *Ristaino* v. *Ross*, 424 U.S. 589 (1976), this Court made explicitly clear that only in instances where issues of race are "inextricably bound up with" the issues that will arise at trial is a state court constitutionally required to inquire specifically as to the possibility of racial prejudice. *Id.* at 597. In *Ristaino*, this Court held that "[t]he mere fact that the victim of the crimes alleged was a white man and the defendants were Negroes was less likely to distort the trial than were the special factors involved in *Ham*." *Id.* at 597. In the absence of special circumstances comparable to those in *Ham*, "the State's obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant." *Id.* at 595 (footnote omitted).

Racial issues infected the entire trial in *Ham*. Racial bias was the essence of the defense and was inescapably before the jurors. Ham's civil rights activities were known in the community, and any latent bias harbored by the jurors would likely be activated by the case and would render his defense ineffectual. Thus, when the racial issues were so salient and the defendant, himself, was a special target for prejudice, the due process clause entitled Ham to have the judge examine jurors specifically for racial prejudice.

In contrast, Petitioner in this case conceded in the Fourth Circuit that there was "nothing special in the facts surrounding this case to suggest racial antagonism." *Turner* v. *Bass*, 753 F.2d 342, 346 (4th Cir. 1985). (*See also* J.A.

32). The racial identities of the defendant and victim, without other factors underscoring the racial elements of the case and their specific application to the defendant, are insufficient to invoke the special precautions of *Ham*.

The Constitution does not require that a specific procedure be utilized on *voir dire* to determine the impartiality of jurors. It is within the sound discretion of the trial judge to determine the precise procedure and questions to be asked to assure impartiality. *Ham* v. *South Carolina*, 409 U.S. at 527-528. As observed by this Court in *Ristaino* v. *Ross*, 425 U.S. 594-595:

> The Constitution does not always entitle a defendant to have questions posed during *voir dire* specifically directed to matters that conceivably might prejudice veniremen against him. *Ham, supra*, at 527-528. *Voir dire* "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." *Connors* v. *United States*, 158 U.S. 408, 413 (1895); *see Ham, supra*, at 527-528; *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931). This is so because the "determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge." *Rideau* v. *Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting).

This Court has recently reaffirmed that the determination of juror impartiality is within the province of the trial judge in *Patton* v. *Yount*, 467 U.S. ——, 104 S.Ct. 2885 (1984), and *Wainwright* v. *Witt*, —— U.S. ——, 105 S.Ct. 844 (1985).

In the instant case, the trial judge conducted the *voir dire* after receiving input from counsel.[9] (J.A. 13-15;

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[9] The manner in which *voir dire* was conducted is consistent with that in federal courts. Rule 24(a), *Fed. R. Crim. P.*

Tr. 14, 25). Petitioner requested the trial court to ask a number of questions, including one[10] concerning racial prejudice. While asking nine of the fourteen questions ultimately proposed by Petitioner, the trial judge declined to address any specific question of racial prejudice to the veniremen.

When the question concerning racial prejudice was proposed, the prosecutor responded by pointing out that "this is not a rational [sic] case. There are no rational [sic] overtones in the allegations of this case. It's a simple case of whether or not the defendant committed murder in the commission of robbery. The fact that you have got people of different races—victim and perpetrator—is of no consequence and I don't think is a proper question of inquiry for the jury." (J.A. 14).[11]

Petitioner offered no reason to the trial judge in support of the proposed question on racial prejudice.[12] Nothing was shown to cause the trial judge to inquire into possible prejudice against Turner because he was black. Some presentation of facts suggesting racial prejudice is essential before a defendant in a criminal case is automatically entitled to have *voir dire* focus on possible racial prejudice

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[10] Question 10 read: "The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?"

[11] In the context of this colloquy, it is clear that the prosecutor was using the word "racial" rather than "rational" as transcribed.

[12] The Supreme Court of Virginia seems to have credited Petitioner with introducing the study of Bowers and Pierce (1979) in support of his proposed question on racial prejudice. *Turner* v. *Commonwealth*, 221 Va. 513, 523, 273 S.E.2d 36, 42 n.9 (1980). A careful review of the record, however, reveals that the study was presented to support Petitioner's argument on the unconstitutionality of the death penalty statutes and was unconnected in any way with the proposed question on racial prejudice. (Tr. 7-13, 27-34).

because this Court, in *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981), noted that "[t]here is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups." *Id.* at 190.

That this Court deems it incumbent upon a defendant to bring to the attention of the trial court those factors which the defendant contends necessitate inquiry into racial prejudice is demonstrated by *Ristaino*. There, a black defendant was charged with a violent crime against a white security guard. The trial judge denied defendant's motion that a question specifically directed to racial prejudice be asked during *voir dire* in addition to customary questions directed to general bias or prejudice. The trial court asked counsel if there was anything peculiar about the case calling for such a special inquiry. Counsel responded, "No, just the fact that the victim is white, and the defandants are black." 424 U.S. at 591.

This court held there that a difference in race between defendant and victim was insufficient to trigger specific questioning as to racial prejudice. The Court further found that the defendant had failed to carry his burden of justifying such questioning when it observed, "Ross was unable to support his motion concerning *voir dire* by pointing to racial factors such as existed in *Ham* or others of comparable significance." 424 U.S. at 598.

There is no *per se* constitutional rule requiring inquiry as to racial prejudice in cases involving a crime of violence between a black assailant and a white victim. *Id.* at 596 n.8. This Court has reasoned:

> Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors'

> ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.

Rosales-Lopez v. *United States*, 451 U.S. at 190.

A trial judge necessarily acts upon information presented to him, but in this case counsel for Turner made no statement with reference to any peculiar or special circumstance calling for a specific inquiry into racial prejudice. Therefore, in the instant case no special circumstances were brought to the attention of the trial judge, nor do any exist. There was no indication that Turner might have been a special target for racial prejudice, and his defense on the merits was solely an effort to undermine the state's case through cross-examination. Turner did not testify, so his credibility did not become an issue. There was nothing about this case to require the special precaution of *Ham*.

With all members of the venire present, Petitioner stood while the indictment was read and requested to be tried by jury. (Tr. 40-43). Thus, at a time when Petitioner's race was readily apparent,[13] the trial judge asked the veniremen, among other questions:

> "Do any of you know any reason whatsoever why you cannot render a fair and impartial verdict in these cases, either for the defendant or for the Commonwealth of Virginia?
>
> Do any of you know why you cannot render an impartial verdict in this case?"

(Tr. 47, 55, 65, 85, 94, 98).[14]

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[13] Because Turner was physically present, all prospective jurors in this case were aware of Turner's race when they underwent *voir dire* whereas, in *Ristaino* the record failed to disclose whether all veniremen knew that the defendants were blacks. *Ristaino* v. *Ross*, 424 U.S. at 593 n.5.

[14] These questions are required by Rule 3A:14(a), Rules of the Supreme Court of Virginia.

These questions were adequate to determine impartiality and lack of prejudice in the absence of any special circumstances like *Ham*, and there was consequently no abuse of discretion in refusing to make a special inquiry into racial prejudice.

The implications of Petitioner's argument, if accepted, would lead this Court to adopt a *per se* rule in capital cases. His thesis appears to be that in every capital case conducted in a state where the death penalty historically had been imposed in a racially disproportionate manner, the trial court must grant a black defendant's request to query the veniremen about racial prejudice where the victim is white. This is but another variation of the theme "capital murder is itself a special circumstance" as proposed by Petitioner in both the Supreme Court of Virginia and the Fourth Circuit.

This Court reflected an aversion to the adoption of a *per se* rule in *Ristaino*, 424 U.S. at 596 n.8:

> In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion. *See Connors* v. *United States*, 158 U.S. 408, 415 (1895).

The adoption of a rule based solely upon a perspective of historical discrimination could not be limited to race but would apply with equal force to questioning about religious affiliation, ethnic origin, sex or national origin. This Court should decline Petitioner's seeming invitation to adopt a *per se* rule in capital cases.[15]

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[15] This Court has resisted the lure to carve out a separate body of law for capital cases in other areas. *See, e.g., Strickland* v. *Washington*, —— U.S. ——, 104 S.Ct. 2052 (1984) (standard for de-

It is highly significant, however, that Petitioner does not attack the general validity of *Ristaino*. As he acknowledges, *Ristaino*, along with *Ham*, requires a "case-by-case" approach as to possible racial prejudice.[16] (Br. 10-12).

Respondent further submits that this Court should not overrule *Ristaino* and announce a new *per se* constitutional rule. Once this Court starts down the road of requiring specific examination on *voir dire* as to a juror's racial attitudes, there will be no principled way for it not to promulgate similar rules in a host of other settings. Under Petitioner's analysis, no reason suggests itself as to why similar inquiry would not be mandatory in such areas as the venire's political, religious and sexual attitudes. Certainly, historical patterns of discrimination might be shown as to all of these matters. Yet, this approach flies in the face of this Court's emphasis in *Ristaino* upon the pluralistic nature of our country.

Furthermore, a *per se* rule would raise numerous practical difficulties. Petitioner, for example, provides no explanation as to why an individual who refuses to be candid in responding to a general question regarding bias would at the same time truthfully answer a more specific inquiry. Further, complex questions would arise in the cases of

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termining ineffective counsel is the same for capital and non-capital cases); *Barefoot* v. *Estelle*, —— U.S. ——, 103 S.Ct. 3383 (1983) (no constitutional barrier to applying the ordinary rules of evidence in capital cases); *Wainwright* v. *Witt*, —— U.S. ——, 105 S.Ct. 844 (1985) (traditional standard for determining a venireman's impartiality should be applied in capital cases).

[16] This is in sharp contrast with trial counsel's argument, as interpreted by the Supreme Court of Virginia, that the proffered racial question should be submitted as a "matter of law." (J.A. 13). The very fact that Petitioner took this position at trial demonstrates that the requirements imposed by *Ham* and *Ristaino* upon criminal defendants to apprise the trial court of special circumstances were not likely to be satisfied in this case.

white-on-black crimes and prosecutions of multiple black defendants.[17] Additionally, Petitioner does not propose how and when the venire would be informed of the decedent's race. These problems illustrate the weaknesses inherent in Petitioner's argument and demonstrate that the Court should not on its own initiative overrule *Ristaino*.

ARGUMENT

II.

Petitioner Failed To Establish A Special Circumstance Requiring Inquiry Into Racial Prejudice

While admitting that there is nothing special in the facts surrounding this case to suggest racial antagonism, Petitioner nevertheless sets forth a listing of ten factors which he suggests are substantial indications of the likelihood of racial prejudice affecting the jurors. Although the only factor arguably brought to the attention of the trial judge was the study of Bowers and Pierce, none of the factors requires adoption of Petitioner's thesis.[18]

A.

The Race of the Victim and the Defendant.

There has never been any question that the defendant is black and the victim was white. This circumstance, however, has not been treated as a special circumstance under *Ham*. *See Ristaino* v. *Ross*, 424 U.S. at 597.

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[17] *See Commonwealth* v. *Lumley*, 367 Mass. 213, 327 N.E.2d 683, 686 (1975).

[18] Some of Petitioner's factors are closely related and have been joined together for argument purposes.

B.

Historical Background

Petitioner commits a considerable portion of his brief to to a discussion of the death penalty as it existed prior to this Court's decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972). Whatever may be said about the historical usage of capital punishment, such a discussion is not relevant to the manner in which capital punishment is being imposed today. As this Court observed in *Gregg* v. *Georgia*, 428 U.S. 153, 195 (1976):

> [T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

See also Proffitt v. *Florida*, 428 U.S. 242, 253 (1976); *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976).

At a minimum this Court's decisions in *Gregg, Proffitt* and *Jurek* stand for the proposition that states may separate themselves from historical backgrounds concerning capital punishment by the enactment of statutory schemes which provide focused attention on the particular defendant and his crime.[19] Since 1977, Virginia has been proceeding under such a constitutional scheme and must be judged upon the manner in which the death penalty is presently being imposed rather than upon what may have occurred in the distant past.[19]

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[19] The procedure for the trial of capital cases is found in Va. Code §§ 19.2-264.2 to 264.5 (1950).

At trial Petitioner introduced a study by Bowers and Pierce, "Preliminary Tabulations Reflecting Arbitrariness and Discrimination Under Post-*Furman* Capital Statutes" (1979). As found by the Supreme Court of Virginia, this study "was based upon statistics compiled in other states [than Virginia] and thus was of little utility in establishing the potential of prejudice in Virginia." *Turner* v. *Commonwealth,* 221 Va. at 523, 273 S.E.2d at 42 n.9 (1980). The studies upon which Petitioner relies lose any force for persuasion when exposed to the harsh realities of facts. Such studies have been severely criticized in other cases as will be developed in depth *infra.*

C.

Voir Dire.

Petitioner argues that the *voir dire* was inadequate to insure an impartial jury.[20] He further asserts that this inadequacy was compounded by dissimilarities between Southampton County, the situs of the crimes, and Northampton County, the place where the trial occurred. None of these factors demonstrates that a special circumstance existed as contemplated by *Ham.*

Petitioner suggests there exists some fundamental sociological distinction between Southampton and Northampton Counties, but this is not borne out by available information.[21] According to the 1980 Official Census, the adult

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[20] Petitioner had argued in other courts that the allegedly cursory *voir dire* and the inability of counsel to directly examine the veniremen had prevented effective use of peremptory challenges. Petitioner abandoned these claims in the Fourth Circuit. This can only be regarded as an acklowledgement that, apart from the trial court's refusal to inquire about racial prejudice, *voir dire* was otherwise sufficient. It is manifest that the Fourth Circuit was not afforded the opportunity to consider the claimed significance of these matters.

[21] Petitioner's wholly unsubstantiated assertion that Southampton County is somehow more cosmopolitan and "a bit closer to the main-

population in Southampton County was 13,545. Of this total 6,290, or 46.4%, were black. Bureau of Census, *1980 Census of Population,* Vol. 1, Chapter B, Part 48 (Virginia) (1982). Comparable figures for the same time period show that in Northampton County the adult population was 10,629. Of this number 4,934 were black for an identical percentage of 46.4. This was not a case where the change of venue resulted in Petitioner being tried in a hostile environment. This is further reflected by the fact that Petitioner's jury included four blacks, one of whom was elected foreman.

Petitioner's claim that *voir dire* was cursory has a hollow ring in view of the record. The trial court solicited input from counsel on questions to be submitted on *voir dire* to the entire venire. Turner's counsel submitted fourteen questions. When requested by the trial court if counsel had other questions they wished to propose, counsel remained silent. (Tr. 33). Obviously, counsel did not believe additional questioning was necessary under the circumstances of this case. Subsequently, the trial court exhibited a willingness to recall individual jurors in order to clarify their prior responses. (Tr. 65-68; 85). It is clear that *voir dire* was as thorough as necessary under the circumstances of this case.

Petitioner repeatedly asserts that *voir dire* lasted less than two hours when the record reflects it consumed in excess of

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stream of Virginia life and politics" is, apart from being irrelevant, incorrect. (Br. 23). At the time of trial, Northampton County was only marginally less populated and had a significantly greater population density (66.5 versus 31.1 persons per square mile) than Southampton County. Eastville, the site of Petitioner's trial, is physically closer to Virginia Beach, the most populous city in Virginia, than Franklin, the situs of the murder. Further, while hardly crucial to the disposition of this case, the one-way fare on the Chesapeake Bay Bridge Tunnel is $9.00, not $20.00 as claimed by Petitioner. (Br. 23).

two and one-half hours. He also points to the fact that only 6 veniremen were removed for cause as compared to 18 in *Ristaino*. Apart from helping to explain why *voir dire* did not require more time, this factor militates in favor of the trial court's refusal to examine specifically on racial bias.

In *Murphy* v. *Florida*, 421 U.S. 794 (1975), this Court, in rejecting a defendant's claim that his right to a fair trial had been violated as a result of extensive pretrial publicity, pointed out that during *voir dire* only 20 of the 78 veniremen examined had been excused because they had formed an opinion as to the defendant's guilt. The *Murphy* Court contrasted that case with the *voir dire* in *Irvin* v. *Dowd*, 366 U.S. 717 (1961), where more than 90 percent of those questioned expressed in varying degrees of intensity an inclination to believe in the defendant's guilt, and the court had excused for cause 268 out of 430 jurors. This Court then stated in *Murphy*:

> In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may have unwittingly been influenced by it. . . . [The disqualification of 20 out of 78 veniremen] by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.

421 U.S. at 803.

These observations apply with even greater force in the present case. The change of venue was to, in Petitioner's words, a "tranquil", non-contiguous jurisdiction. (Br. 23). The *voir dire* demonstrated that the veniremen were wholly ignorant of the facts underlying the murder. None

of the veniremen revealed the slightest familiarity with Petitioner or the victim. The atmosphere was free of racial tension and any suggestion to the contrary is rebutted by the fact that a black was elected foreman of the jury, a majority of whom were white. The record in this case is simply devoid of any indications that racial prejudice was such a likely factor that it had to be dealt with in a special way as in *Ham*. Petitioner's references to the actions of a handful of individuals in Richmond some five years after Petitioner's trial at a time when two Richmonders, notorious in that community for their rash of brutal crimes, were being executed cannot alter the fact that his own case is devoid of any indication of racial prejudice.[22]

Under these circumstances, this Court's admonition in *Ham* and *Ristaino* that *voir dire* normally need not be conducted in any particular fashion is especially apt. Any suggestion by Petitioner that the questions put to the venire were insufficient to uncover their biases is groundless. In *Murphy* this Court implicitly recognized that jurors' expressions of impartiality should normally be respected, particularly where, as here, the record establishes that the community as a whole bears no animus toward the defendant.

That specific inquiry into racial prejudice is not required

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[22] The trial in *Ristaino* was conducted in Boston in 1970. The jury, which consisted of 10 whites and 2 blacks, *see Commonwealth* v. *Ross*, 363 Mass. 669, 296 N.E.2d 810, 815 (1973), was chosen at a time when the City of Boston was experiencing well-documented racial tensions in connection with an on-going controversy surrounding school desegregation. *See, e.g., Morgan* v. *Hennigan*, 379 F. Supp. 410, 414-30 (D. Mass.), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). If Petitioner's analysis in this case—which attempts to challenge the trial judge's ruling on the basis of actions far removed in time and distance—were correct, it is difficult to understand how this Court could have arrived at its disposition in *Ristaino*.

even where historical prejudice is shown is demonstrated by *Dukes* v. *Waitkevitch,* 536 F.2d 469 (1st Cir)., *cert. denied,* 429 U.S. 932 (1976). There, the Court of Appeals held that a black defendant, accused with other blacks of raping two white women, was not entitled to habeas relief despite the trial court's refusal to pose questions during *voir dire* regarding racial prejudice. Rejecting a historical argument much like that being presently advanced—that charges of interracial rape have historically exacerbated racial prejudice to an extreme degree—the First Circuit concluded that *Ristaino,* not *Ham,* controlled. The Court concluded that even though "interracial rape may be a classic catalyst of racial prejudice," it was not the confrontation between persons of different races which required special *voir dire* on racial bias. *Id.* at 470. Rather, the court explained, "[I]t was the racial overtones of Ham's civil rights activities and his 'frame-up' defense—discrete trial issues '[which] were likely to intensify any prejudice the individual members of the jury might harbor.' " *Id.* at 470 (quoting *Ristaino* v. *Ross,* 424 U.S. at 597).

Petitioner also complains that he was allotted too few peremptory challenges and was forced to select the jury on the basis of hunches and surmise. Petitioner has never in any other court raised the slightest suggestion as to any inadequacy in the number of peremptory challenges authorized by Virginia law. Rather, he has merely contended that he was forced to exercise his challenges on the basis of too little information. As noted, Petitioner's counsel never requested the trial court to ask additional questions, and it is much too late to make such an assertion.

This Court has stated many times that peremptory challenges are not constitutionally obligatory. *See Rosales-Lopez, supra,* 491 U.S. at 188; *Swain* v. *Alabama,* 380

U.S. 202, 219 (1965). Moreover, the mere fact that the asking of additional questions is "helpful" to an attorney in deciding how to exercise his peremptory challenges hardly demonstrates its constitutional basis. As the Second Circuit observed in *United States* v. *Gibbons*, 602 F.2d 1044 (1978), *cert. denied*, 444 U.S. 950 (1979):

> [T]he right of the peremptory challenge does not command a right to the peremptory question. Whatever the attorney's power to strike a number of venirepersons at will may be, to recognize a correlative right to question at will—without in any way identifying the motivating concern—would strip the judge of his control over the proceedings. Any question could be labeled necessary for some unspoken element in the decision to challenge peremptorily.

602 F.2d at 1051.

It is not, after all, the prospective jurors who are on trial in the cases which come before the courts. As counsel seek more and more information to aid in filling the jury box with persons of a particular type whom they believe to be well disposed toward their clients, prospective jurors will be less than willing to serve if they know that unnecessary inquiry into their essentially private concerns will be pressed. As long as a defendant's rights are protected by a *voir dire* designed to uncover bias and impartiality, then reasonable limitations on the questioning should not be disturbed.

D.

Jury Discretion

While recognizing that this Court has authorized giving the sentencer broad discretion in capital cases, Petitioner

urges that a special circumstance under *Ham* is somehow made out by the fact that the jury's recommendation of sentence is virtually conclusive. His argument seems to be premised upon an unfounded assumption that Virginia trial and appellate courts are not properly performing their review functions.

In response to this Court's decisions in *Gregg, Jurek* and *Proffitt,* the Virginia legislature enacted a statutory scheme considerably narrowing the circumstances under which capital punishment is authorized. Like Texas, Virginia has narrowed the categories of murders for which a death sentence may be imposed.[23] Additionally, Virginia law requires that the jury at the penalty stage find either of two specific aggravating circumstances proven beyond a reasonable doubt before the death penalty can be imposed.[24] The Virginia Supreme Court has held that, notwithstanding proof of aggravating circumstances, the jury is at liberty under the capital sentencing statute to recommend life im-

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[23] Va. Code § 18.2-31, defines capital murder as the willful, deliberate and premeditated killing in any of eight situations, *i.e.,* (1) during an abduction with intent to extort money or a pecuniary benefit; (2) for hire; (3) by a prisoner; (4) during a robbery while armed with a dangerous weapon; (5) during rape; (6) of a law-enforcement officer for the purpose of interfering with the performance of his official duties; (7) of more than one person as a part of the same act or transaction; (8) of a child under the age of twelve years during an abduction with intent to extort money or a pecuniary benefit or with intent to defile.

[24] These aggravating circumstances are:

1. "that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society;" or
2. "that his conduct in commiting the offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."

Va. Code § 19.2-264.2(1).

prisonment. *Smith* v. *Commonwealth,* 219 Va. 455, 248 S.E.2d 135, 150 (1978), *cert. denied,* 441 U.S. 967 (1979).

Virginia's capital punishment statutes are substantially similar to those upheld by this Court in *Gregg* v. *Georgia, supra,* and *Jurek* v. *Texas, supra.* In each of these cases, this Court concluded that the jury's discretion was constitutionally exercised. In *Gregg,* it was determined that the discretion exercised by the jury was " 'controlled by clear and objective standards so as to produce non-discriminatory application.' " 428 U.S. at 198 (quoting *Coley* v. *State,* 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)). Likewise, in *Jurek,* this Court characterized the Texas scheme as one that "guides and focuses the jury's consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." 428 U.S. at 274. Accordingly, irrespective of whatever level of discretion a capital jury in Virginia is deemed to possess, the Virginia statute insures that this discretion will be exercised in a constitutional manner.

Under Virginia's capital punishment scheme, when the punishment of any person has been fixed at death, the trial judge is required to order a post sentence report and must then determine whether the sentence of death is appropriate.[25] This review by the trial judge is a guard against the arbitrary and discriminatory imposition of a sentence of death. The trial judge, having observed all facets of the trial, stands in the best position to know whether the death sentence has been imposed on the basis of some arbitrary factor, and the trial judge is authorized to impose a sentence of life imprisonment in any case. This review procedure by Virginia trial judges stands in contrast to that of Georgia and Texas where the trial judge

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[25] Va. Code § 19.2-264.5.

is bound by the jury's sentence. *See Gregg* v. *Georgia,* 428 U.S. at 166; Tex. Code Crim. Proc. Ann., art. 37.071 (Vernon 1981).

Petitioner's criticism that Virginia trial judges rarely interfere with a jury's recommendation of a sentence of death, rather than establishing a special circumstance to require inquiry into racial prejudice, in fact strengthens Respondent's position. The fact that Virginia trial judges have the authority to impose a life sentence where the jury has recommended death provides a greater procedural safeguard against discriminatory application than the procedure approved by this Court in *Gregg.*[26]

Petitioner's claim that the Virginia Supreme Court has failed to perform meaningful appellate review of capital cases is both regrettable and unsupported by the record. In every capital case, including Petitioner's, the Virginia Supreme Court has conscientiously performed its statutory mandate to review every sentence of death for arbitrariness and disproportionality.[27] The lack of success by defendants in attacking their death sentences is not equivalent to an absence of meaningful appellate review by the Virginia Supreme Court. Significantly, Petitioner has not referred this Court to a single case to support his bald assertion of

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[26] Petitioner's statement that in only 2 out of 39 cases has the judge refused to impose a jury-recommended death sentence appears to be correct. (Br. 31 and n.6). His statement that both cases involved white defendants is incorrect. Robert McClark is black.

[27] Va. Code § 17-110.1 mandates automatic appellate review of death sentences by the Supreme Court. The Court must consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

inadequate review.[28] Because the Virginia Supreme Court has not found any death sentence to be excessive or arbitrary does not supply Petitioner cause to malign that court. A cursory reading of the facts involved in capital cases in Virginia would convince even the most skeptical that Virginia reserves the death sentence for the most egregious circumstances.

Capital murder in Virginia is so narrowly circumscribed as to weed out marginal cases at the outset. To come within the statutory ambit of capital offenses, the murder must generally be accompanied by another crime, which is itself considered by society to be quite serious, *i.e.*, rape, armed robbery, abduction, multiple murder. The other special circumstances necessary to elevate a murder to a capital offense, *i.e.*, murder for hire, killing a law-enforcement officer to prevent the performance of official duties, and murder by an inmate, while not involving additional crimes, concern matters which strike at the very heart of civilized society. Moreover, a sentence of death cannot be imposed merely upon proof of one of these special categories of murder. The Virginia scheme also requires the state to prove beyond a reasonable doubt either that the defendant poses a future danger or that the crime was vile.[29]

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[28] The Fourth Circuit has reviewed five cases from Virginia involving a sentence of death and has yet to find a single cause for reversal.

[29] In *Commonwealth* v. *Ronald Thatcher,* Circuit Court City of Williamsburg, Docket No. 2937, the defendant was convicted of capital murder of a law-enforcement officer. The Commonwealth, however, never sought a death sentence for it could prove neither of the aggravating circumstances. The defendant had only a minor criminal record, and the victim was killed with a single shot. *See Smith* v. *Commonwealth,* 219 Va. 445, 478, 248 S.E.2d 135, 149 (1979), *cert. denied,* 441 U.S. 967 (1979). (A single shot, not being more culpable than the minimum necessary to accomplish an act of murder, is insufficient to establish an "aggravated battery").

Because Virginia capital punishment statutes are more circumscribed than most, if not all, similar statutes, much of the discretion given to juries in other states is necessarily eliminated in Virginia at the outset. The very fact that a defendant in Virginia convicted of capital murder will have to have committed a homicide far more aggravated than most murders, combined with the fact that at least one of two aggravating circumstances must also be proven, makes it much less likely that an appellate court will find the penalty disproportionate or the result of passion or prejudice. Thus, it is not surprising that the Supreme Court of Virginia has not reversed a death sentence on this ground. It is highly significant, however, that three of four reversals by that Court involved a sustaining of the defendant's argument that the *voir dire* had been inadequate to insure a fair jury.[30]

E.

Mid-Range Case.

Petitioner suggests that there is a significant likelihood that racial biases will affect a jury's decision on sentencing in a mid-range case. Petitioner is incorrect in assuming that his case falls within the mid-range, and his reliance upon events which occurred over two decades ago is inappropriate.

This case is far more than Petitioner's characterization of "a bungled robbery." (Br. 13). Petitioner's killing of Mr. Smith was nothing less than a cold and calculated execution. Mr. Smith, after receiving a head wound, lay helpless on the floor. He posed no threat to Petitioner and was

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[30] *See Justus* v. *Commonwealth*, 220 Va. 971, 266 S.E.2d 87 (1980); *Martin* v. *Commonwealth*, 221 Va. 436, 271 S.E.2d 123 (1980); *Patterson* v. *Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981).

in no position to interfere with an escape by Petitioner. Not satisfied with having rendered Mr. Smith immobile, Petitioner set out to exact the most evil sort of revenge upon Smith for his having activated a silent alarm. Petitioner's subsequent shooting of Mr. Smith was not the result of an accident or panic but was intentional and punitive. The murder of Mr. Smith was by any reckoning "vile." Moreover, Petitioner's past record established a complete disregard for human life. In the span of four years he had murdered another person and had engaged in three other episodes where he seriously threatened human life. Petitioner's record for violence was unquestionably serious and can hardly be characterized as mid-range.

Petitioner's reliance upon the Baldus study utilized in *McCleskey* v. *Zant*, 580 F. Supp. 338 (N.D. Ga. 1984), *rev'd on other grounds sub nom. McCleskey* v. *Kemp*, 753 F.2d 877 (11th Cir. 1985), is misplaced. Petitioner refers to the conclusion in the Baldus study that mid-range cases were the ones in which the influence of racial prejudice was greatest.[31] The study, which focused on the race of the crime victim, concluded that on average a white victim crime was 6% more likely to result in a death sentence than a comparable black victim crime. This race-of-the-victim effect was said to increase to 20% in cases involving mid-range levels of aggravation. In finding no support for this conclusion of racial effect, the Eleventh Circuit said:

> [T]he figure reflects that the variables included in the study do not adequately explain the 20% disparity and that the statisticians can explain only by *assuming* the racial effect. More importantly, Baldus did not testify that he found statistical significance in the 20%

[31] "Baldus did not purport to define the mid-range cases; nor is such a definition possible." *McCleskey* v. *Kemp*, 753 F.2d at 898.

> disparity figure for mid-range cases, and he did not adequately explain the rationale of his definition of the mid-range cases. His testimony leaves this Court unpersuaded that there is a rationally classified, well-defined class of cases in which it can be demonstrated that a race-of-the-victim effect is operating with a magnitude approximating 20%.

McCleskey v. *Kemp*, 753 F.2d at 898 (emphasis added). Even if Petitioner's case were to be classified in the mid-range, there is no evidence to support his proposition that racial prejudice affects the sentence in such cases.

Petitioner's reference to lynchings which occurred in this country over twenty years ago has no relevance in light of contemporary society. Petitioner himself acknowledges that the racial climate in this country has continued to change for the better. (Br. 35). Thus, a more restrictive rule than that established in *Ristaino* would be unwarranted. That society has progressed from the vestiges of the past was noted by Justice Powell in *Furman*:

> The possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for interracial crimes, is now no longer prevalent in this country. Likewise, the day is past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history.

Furman v. *Georgia*, 408 U.S. 238, 450 (1972) (Powell, J., joined by Burger, C.J., Blackmun and Rehnquist, J.J., dissenting).[32]

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[32] State law mandates that jury lists be prepared by random selection techniques. Va. Code § 8.01-345.

Petitioner asks whether he had a right to know if racially biased individuals were on his jury. Not only Petitioner, but all defendants, are guaranteed this right. The *voir dire* conducted in this case was sufficient to address this issue and was consistent with the *voir dire* approved by this Court in *Ristaino*.

F.

Disproportionality

Petitioner has maintained that he does not ask this Court to assume or presume anything. (Br. 12). Yet, that is precisely what he seeks. He asks the Court to assume that the conclusions contained in the study by Bowers and Pierce are applicable to Virginia even though the statistics which give rise to the conclusions bear no relationship to how capital punishment is being administered in Virginia. He also urges the Court to presume the validity of the Gross and Mauro study, *Patterns of Death: An Analysis Of Racial Disparities In Capital Sentencing And Homicide Victimization* (unpublished study) (October, 1983), as it applies to Virginia even in the face of the authors' own admonitory statement in the study that

> [a] word of caution is in order. As we go down the list of states from Oklahoma to Arkansas our data became increasingly attenuated. Our study includes 43 death sentences in Oklahoma, 27 in North Carolina, 22 in Mississippi, 19 in Virginia and 15 in Arkansas. Considered in isolation, such small numbers make any sentencing patterns hard to discern: only very strong effects can be seen clearly with so few observations. *Some of the racial disparities that we report would not, on their own, constitute convincing proof of racial discrimination; that is particularly true for Arkansas and Virginia, in each of which we studied fewer than twenty death sentences.*

(J.A. 34) (emphasis added). The authors further found that "[i]n Virginia and Arkansas the race of the victim had less pronounced and statistically non-significant effects." (J.A. 37).

The study by Gross and Mauro (Study) suffers from a fundamental deficiency. It utilizes overly general information from which to draw specific findings. The data base from which the statistics relating to Virginia are drawn is seriously flawed. The Study is based upon all homicides, not just those for which capital punishment is statutorily authorized. The homicide figures used in the Study include first and second degree murders and manslaughters for which defendants are never eligible to receive a sentence of death. The Study, therefore, is comparing capital murders with deaths from motor vehicle accidents, family disputes and the like. The raw data selected for the statistical study bear no relationship to capital cases actually presented for trial in Virginia. The inclusion of cases in which the defendant is never eligible for a sentence of death invalidates the conclusion of the Study purporting to find racial discrimination in death sentences. The court in *Shaw* v. *Martin*, 733 F.2d 304, 312 (4th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 555 (1984), found a similar study conducted by Dr. Raymond Paternoster invalid for this very reason.

Moreover, the Study lacks statistical validity because it does not adequately compare murders of similar atrocity. *See Shaw* v. *Martin*, 733 F.2d at 312. The Study arbitrarily classifies homicides by the use of three factors, *i.e.*, the commission of a homicide in the course of another felony, the killing of a stranger, and the killing of multiple victims. These factors bear little or no relationship to the Virginia capital murder scheme. For example, the deliberate murder in the commission of a burglary is not a

capital offense in Virginia. The relationship between the defendant and the victim is unimportant, and the killing of multiple victims was not made a capital offense until 1981, a year after the latest figures used in the Study. The Study does not take into account the statutory aggravating factors. *See McCorquodale* v. *Balkcom*, 705 F.2d 1553, 1556 (11th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 2161 (1984). No incidents resulting in not guilty verdicts were removed from the raw data. In short, the Study fails to measure capital punishment in Virginia.

There are "countless racially neutral variables" involved in the sentencing of capital cases. *Smith* v. *Balkcom*, 671 F.2d 858, 859 (5th Cir.), *cert. denied*, 459 U.S. 882 (1982). There is little likelihood that generalized studies will be developed which would exclude every possible factor which might account for differences between crimes and defendants, exclusive of race. As long as there remains a subjective component in sentencing, "not only will no two defendants be seen identical by the sentencers, but no two sentencers will see a single case precisely the same." *McCleskey* v. *Kemp*, 753 F.2d 877, 894 (11th Cir. 1985).

The Gross and Mauro study has been rejected by the Fourth Circuit which stated, "[T]he Virginia statistics . . . presented are wholly inconclusive." *Briley* v. *Booker*, 746 F.2d 225, 227 (4th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 286 (1984). A similar study by Gross and Mauro relating to the death penalty in Florida was rejected in *Sullivan* v. *Wainwright*, 721 F.2d 316 (11th Cir. 1983); and *Adams* v. *Wainwright*, 709 F.2d 1443 (11th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1432 (1984). Studies similar to those of Bowers and Pierce and Gross and Mauro have been found to be invalid and untrustworthy due to the substantial flaws in the data base. *See McCleskey* v. *Zant*, 580 F.Supp. 338, 360 (N.D. Ga.

1984) (Baldus study); *Shaw* v. *Martin*, 733 F.2d 304 (4th Cir. 1984) (Paternoster study). Likewise, generalized studies have been found wanting by members of this Court. Justice Powell writing in dissent from a stay of execution observed, "It should be apparent from the decisions of this Court since *Gregg* was decided that claims based merely on general statistics are likely to have little or no merit under statutes such as that in Georgia." *Stephens* v. *Kemp*, —— U.S. ——, 104 S.Ct. 562, 565 (1984) (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, J.J., dissenting).

The studies relied upon by Petitioner were produced by social scientists. Social science, however, is a nonexact science. Because of the limitations of such studies, courts must always be mindful that such research deals with highly complex behavioral patterns and institutions that exist in a highly technical society. The Bowers and Pierce study does not even purport to examine the administration of capital punishment in Virginia and "is simply too diffused in its depiction of likely community, hence juror, attitudes in this particular case to" demonstrate a likelihood of racial prejudice affecting the jury. *Turner* v. *Bass*, 753 F.2d at 355 (Phillips, J., concurring). The data base in the Gross and Mauro study is so flawed as to render the study meaningless. No amount of speculation, surmise or conjecture can substitute for evidence. Petitioner has presented no statistically significant evidence to show that the death penalty in Virginia is being applied discriminatorily.

CONCLUSION

In *Ristaino* v. *Ross*, this Court clearly held that a generalized *voir dire* was sufficient to expose bias and prejudice in the absence of a showing of special circumstances like

those in *Ham*. Petitioner does not challenge the continuing vitality of *Ristaino*. Therefore, this case represents nothing more than an application of the principles articulated in *Ristaino* and *Ham*.

In the case at bar, Petitioner has failed to establish any special circumstances which would have required the trial court to conduct a specific inquiry into racial prejudice. To the contrary, the evidence establishes that race was not an issue. Petitioner was unknown to the veniremen, and the evidence as to guilt and sentencing was overwhelming. Petitioner's jury was composed of four blacks, any one of whom could have assured him a sentence of life.

To accept Petitioner's position would require this Court to adopt a *per se* rule in capital cases and perhaps in non-capital ones as well. In every such case a specific inquiry into racial prejudice would be mandated. Such a rule is both unwarranted and unwise. It would serve to undermine that cherished principle that every person can obtain justice in our courts.

The Commonwealth respectfully submits that this Court should affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

WILLIAM G. BROADDUS
Attorney General of Virginia

JAMES E. KULP
Senior Assistant Attorney General

ROBERT H. ANDERSON, III
Assistant Attorney General

Date: August 12, 1985

ADDENDUM

A. 1

AFFIDAVIT

State of Virginia, County of Northampton, to-wit:

C. E. GIBB, first being duly sworn, states as follows:

1. I am Clerk of the Circuit Court of Northampton County and was serving in this capacity in 1979 when Willie Lloyd Turner was tried in this County for the capital murder of Jack Smith, Jr..

2. The following four persons who served as jurors in Turner's case were black: Albert T. Christian; Charles R. Roselle; Kathy Ellen Bailey; and J. E. Worsley. Worsley also served as jury foreman.

C. E. GIBB

/s/ C. E. GIBB

Affiant

Sworn and subscribed to before me, a Notary Public, in and for the State of Virginia, County of Northampton, At Large, this 11th day of July, 1985.

KATHERYN B. BELOTE

/s/ KATHERYN B. BELOTE

Notary Public

My commission expires: Aug. 1, 1987.